This Recommended Order and Decision was followed by an Order and Decision in the 2nd Quarter of 2004.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MARCO OROZCO,	)	
	)	**CHARGE: 1992CA0529**
Complainant,	)	**EEOC: 21B913245**
	)	**ALS: 7178**
and	)	
	)	
DYCAST, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Chicago, Illinois on October 1, 2001 through October 4, 2001, November 14, 15 and 18, 2001 and December 1, 2001. On May 31, 2002, Complainant and Respondent filed their Post-Hearing Briefs, respectively. On August 23, 2002, both Complainant and Respondent filed their Reply Briefs. Accordingly, this matter is ripe for decision.

CONTENTIONS OF THE PARTIES

Complainant contends that he was the victim of national origin and ancestry discrimination when Respondent: (1) subjected Complainant to slurs based on his national origin and ancestry (Colombian/Hispanic), such as statements allegedly continuously made by Charles Davidson, Vice President of Manufacturing (non-Colombian / non-Hispanic), that referred to the Hispanic workforce as "Stupid Spanish people," "fucking Spanish people," and "fucking people;" (2) Respondent referred to Complainant and two other Colombian employees as the "Colombian

Mafia;" and (3) terminated Complainant on the basis of his national origin and ancestry. Complainant further contended that he was terminated due to his age, 56.

Respondent contends that Complainant has not established a *prima facie* case of unlawful discrimination based on national origin and ancestry because of his failure to produce any instances where Respondent demonstrated any discriminatory animus towards him or any other Hispanic employees. Respondent contends that Dycast, Incorporated treated the Complainant in a non-discriminatory manner when they eliminated his position because of a legitimate business decision to reduce their workforce. Respondent further contends that Complainant has failed to establish a *prima facie* case of age discrimination.

FINDINGS OF FACT

Based upon the record in this matter, I make the following findings of fact:

1. Complainant's national origin is Colombian and his ancestry is Hispanic.

2. Complainant was employed by Dycast, Incorporated from October 28, 1971 to April 19, 1991.

3. In 1976, Complainant was promoted to the position of Metals Supervisor and remained in that position until April 19, 1991 when his position was eliminated and as a result, he was laid-off and not recalled.

4. Complainant was responsible for supervising three Metals Shop employees. Part of Complainant's responsibilities also entailed supervising the janitors, working in the stock room and other medial duties such as disposing of inventory, shipping and loading, and driving a truck when necessary.

5. There was a leveraged buyout of Respondent Dycast by New York-based investors on November 21, 1988. As a result of the new ownership, a new management team

was put into place, which consisted of Robert Zach / President, Charles Davidson / Vice President of Manufacturing, Norman Kocol / Vice President of Finance, Ralph Graber / Vice President of Engineering, and Fabio Herrera / Human Resources Manager.

6. From 1989 to 1991, Respondent experienced financial difficulties which consisted of loss of financing, the loss of contracts worth over two million dollars, as well as the loss of invested capital.

7. As a result of the financial difficulties it was experiencing, Respondent instituted a number of cost-cutting measures prior to April of 1991, which included the reduction of overtime, a wage and salary freeze for three years, reduction in executive salaries by 10 to 25% in 1991, renegotiated payment terms with prior owners and repayment plan with creditors, as well as layoffs.

8. On March 15, 1991, Charles Davidson was fired as Vice President of Manufacturing by Respondent for being verbally abusive towards Respondent's employees. On April 12, 1991, Bernard Soya replaced Mr. Davidson. Mr. Davidson did not make any racial remarks to any employees nor did he single-out any particular individuals in his verbal tirades.

9. In April of 1991, Respondent continued to experience financial difficulties. As a result, Respondent implemented a series of layoffs of hourly and salaried employees. Each of Respondent's four departments was required to eliminate one salaried employee. In addition, Respondent eliminated one member of its management team.

10. In April of 1991, Complainant's Metals Supervisor position was eliminated upon the vote of a five-member committee and Complainant's former job duties were reassigned to Ron Pearson and Transito Contreras. As a result of the job elimination, Complainant was laid-off and was not called back.

11. In all, Respondent's management committee voted to eliminate the following salaried positions:

Department	Position	Employee	Race	Reason for Elimination
Quality	Quality Assurance Secretary	Carmen Avila	Hispanic/ Argentinean	Duties absorbed by other Personnel
Finance	Cost Accountant[1]	Judy Schmidt	Caucasian	Duties absorbed by Kocol
Finance	MIS Manager	Scott Vogel	Caucasian	Duties were non-essential
Engineering	Time-Study	Phil Hammel	Caucasian	Duties were non-essential
Human Resources	HR Director[2]	Fabio Herrera	Hispanic/ Colombian	Duties absorbed by Kocol
Manufactur-ing	Supervisor	Marco Orozco	Hispanic/ Colombian	Duties absorbed by Pearson and Contreras

12. The racial makeup of Respondent's workforce at the time of the reduction in force was predominantly Hispanic. The makeup of the five supervisors in the manufacturing department was as follows:

Supervisor	Race	Position	Number of Employees Supervised
Marco Orozco	Hispanic/ Colombian	Metals Supv.	3
Jesus Martinez	Hispanic/ Mexican	Shipping and Receiving Supv.	18
Julio Noguera	Hispanic/ Ecuadorian	Secondary Dept. Supv.	25 to 40
Jesus Carrillo	Hispanic/ Mexican	Second Shift Supv.	20

[1] The Cost Accountant position was eliminated until 1995 when the position was reinstated.

Neff Herrera	Hispanic/ Colombian	Die-Casting and Trim Supv.	24 to 60
Santos Carrillo[3]	Hispanic/ Mexican	Second Shift Supv.	20

13. During the 1991 reduction in force, no salaried employees, whose positions were eliminated, were allowed to bump any other employees regardless of their seniority.

14. The term "Colombian Mafia" was used by the Hispanic floor workers as early as 1985. In April of 1990, Nixon Hare, the CEO for Respondent's investment group inquired about the "Colombian Mafia." In April of 1991, Mr. Kocol made a remark directed towards Fabio Herrera prior to a management meeting in which he said in essence, "We're waiting for the Colombian Mafia to start the meeting" and/or "Here comes the Colombian Mafia."

15. In January of 1991, Respondents were concerned about the English literacy among its Hispanics employees due to the training requirements imposed by one of Respondent's clients to upgrade to a Q-1 rating system.

16. Respondent did not treat Complainant differently from other non-Colombian or non-Hispanic employees when they eliminated his position of Metals Supervisor and did not allow him to bump a less senior employee in a different job category.

17. Complainant failed to present any evidence of age discrimination during the hearing in this matter.

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[2] Mr. Kocol took over the duties of the HR Director until 1995 when Respondents hired another person for the position.

[3] Santos Carrillo was promoted to a Die-Cast Process Engineer in 1991.

CONCLUSIONS OF LAW

1. Complainant is an "employee" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/2-101(A)(1)(a) and 5/2-101(B)(1)(a), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant has failed to establish a *prima facie* case of age discrimination.

4. Respondent is entitled to a directed finding on the issue of age discrimination as a matter of law.

5. Complainant established a *prima facie* case of discrimination based upon national origin and ancestry.

6. Dycast had a legitimate financial business reason to eliminate the position of Metals Supervisor.

7. Complainant has failed to prove by a preponderance of the evidence that the reasons given by Respondent for eliminating the Metals Supervisor position was a pretext for discrimination.

8. Complainant has failed to prove that Respondent unlawfully discriminated against him by laying him off without recall and denying him the opportunity to bump another less senior employee.

DETERMINATION

Complainant has failed to prove by a preponderance of the evidence that he was the victim of national origin and ancestry discrimination prohibited by Section 2-102(A) of the Act.

DISCUSSION

Respondent' Motion for Directed Verdict on Age Discrimination Claim:

The Human Rights Commission has the authority to consider motions for directed finding. Koulegeorge v. Human Rights Comm'n, Ill. Dept of Human Rights and Tempel Steel Co., 316 Ill. App. 3d 1079, 250 Ill.Dec. 208 (1st Dist. 2000); Yates and Salvation Army Adult Rehabilitation Center and Lila Delong, Ill.HRC Rep. (1988SP01823, August 27, 1993); Anderson v. Human Rights Comm'n, 314 Ill.App.3d 35. The Commission has held that motions for directed finding are appropriately considered at the conclusion of Complainant's case in chief. Mott and City of Elgin, Ill.HRC Rep. (1986CF3090, June 30, 1992); Burch and Caterpillar Tractor Co., 3 Ill. HRC Rep. 106 (1982); Cockrell and CNA Insurance Co., 1 Ill. HRC Rep. 171 (1981).

At the close of Complainant's case in chief, Respondent moved for a directed finding arguing that Complainant was unable to establish a prima facie case of age discrimination. In deciding whether the Complainant has made a showing of proof sufficient to survive a motion for directed finding, a two-step analysis must be applied. Happel v. Mecklenburger, 101 Ill. App. 3d 107, 427 N.E.2d 974 (1st Dist. 1981). This analysis requires the trier of fact to determine first, as a matter of law, whether the claimant has presented some evidence, more than a scintilla, on every essential element of his cause of action. If not, the movant is entitled to a directed finding. If some evidence has been presented, then all of the evidence must be weighed, including the evidence favorable to the Respondent. The trier of fact must weigh credibility, draw reasonable inferences and consider the weight and quality of the evidence. If this weighing process results in the negation of some of the evidence necessary to the Complainant's prima facie case, the Respondent is entitled to a judgment in its favor. Kokinis v. Kotrich, 81 Ill.2d

151, 407 N.E. 2d 43, (1980). It is well established that the initial burden of establishing a prima facie case of discrimination rests with the Complainant. McDonnell-Douglas v. Green 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

To establish a prima facie case of age discrimination the Complainant was required to prove by a preponderance of evidence that: (1) he is a member of a protected class (age 40 or over); (2) he was doing his job well enough to meet the employer's legitimate expectations; (3) he was discharged; and (4) similarly-situated younger employees were treated materially better. Illinois J. Livingston Co. Human Rights Comm'n, 302 Ill.App. 3d 141, 704 N.E.2d 797, 235 Ill. Dec. 224 (1998).

At the close of Complainant's case in chief, it was clear that Complainant had not presented any evidence of age discrimination. The record is totally void of any reference by Complainant in regards to an age discrimination claim. Not only had Complainant failed to address the issue of age discrimination during his case in chief, but he also failed to present any evidence of any similarly-situated younger employees who were treated materially better. It was for this reason Respondent's motion for a directed verdict was granted. It should be noted that Complainant did not contest the directed verdict finding in his Post-Hearing brief.

Complainant's Motion to Amend the Complaint to Conform to the Proofs:

At the close of Complainant's case in chief, Complainant moved to amend the Complaint to incorporate the pleadings to conform to the evidence in regards to a charge of retaliation. Complainant moved to amend its Complaint pursuant to Sec. 2-616(c) of the Illinois Code of Civil Procedure which provides in relevant part:

"(c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." (Ill.Rev.Stat. 1989, ch. 110, par. 2-616(c)."

56 Ill. Admin. [*2] Code, Sec. 5300.650 provides in relevant part:

"(a) At any time prior to issuance of the Administrative Law Judge's recommended order and decision, the pleadings may be amended for good cause shown. A motion to amend under this subsection shall be in writing, and shall state the specific amendments proposed and the reasons therefor."

Complainant contended that the letter marked as Complainant's Exhibit #2 was in effect activity that was protected under the Act. At the close of the hearing, I found that the letter that was sent to Respondent's management by Complainant was void of any reference to any complaints of discrimination. Also noted was the fact that Complainant had originally filed a charge of retaliation with the Department, which found no substantial evidence to support such a charge. Accordingly Complainant's motion was denied.

Complainant's Claim of National Origin and Ancestry Discrimination:

Under the analysis found in Zaderaka v. Illinois Rights Commission, 131 Ill.2d 172 (1989), Complainant must prove discrimination in one of two ways: he may attempt to meet his burden by presenting direct evidence that national origin or ancestry was a determining factor in the employment decision; or he may use the indirect method of proof set out in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To prove a case of discrimination under the direct approach, a Complainant must prove by direct evidence that the employer placed substantial reliance on a prohibited factor.

When there is no direct evidence of unlawful discrimination by a respondent, it is usual for the analysis of the evidence to proceed under the process described in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This process requires the Complainant to first establish a prima facie case of discrimination by a preponderance of the evidence, which can then be rebutted by the articulation (not proof) of a "legitimate, nondiscriminatory reason" by Respondent for the action taken. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). If this is done successfully, Complainant must then establish, again by a preponderance of the evidence, that the reason advanced by Respondent is merely a pretext for the alleged discriminatory conduct. This method of proof has been adopted by the Commission and approved for use here by the Illinois Supreme Court. Zaderaka v. Illinois Human Rights Comm'n, 131 Ill.2d 172, 178, 545 N.E.2d 684, 137 Ill.Dec. 31 (1989). This latter requirement merges with the Complainant's ultimate burden of proving that the Respondent discriminated unlawfully against the Complainant. See, Village of Oak Lawn v. Human Rights Commission, 113 Ill.App.3d 221, 478 N.E.2d 1115, 88 Ill.Dec. 507 (1985). In essence, the Complainant must show that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. See, Stanley Clark v. Illinois Human Rights Commission and Rodriguez & Villalobos, 312 Ill.App.3d 582, 728 N.E.2d 582, 245 Ill.Dec. 500 (1st Dist. 2000).

In accordance with the "McDonnell-Burdine" standard, in order to establish a prima facie case of national origin discrimination, the Complainant must prove that: (1) he is a member of a protected class; (2) he was performing his job consistent with respondent's legitimate expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees were treated more favorably.

Racial Slurs Pertaining to National Origin and Ancestry as Direct Evidence:

Complainant contends that as of March 1989 when Respondents took over the company and hired Charles Davidson as the Vice President of Manufacturing, he and other Hispanic workers were exposed to loud and intimidating abuse. Complainant claims that Mr. Davidson continuously referred to the Hispanic workforce as "stupid Spanish people," "fucking Spanish people," and "fucking people." Complainant also maintains that Respondent's management used the term "Colombian Mafia" to refer to the Colombian workers at Dycast. Complainant argues that these remarks constitute direct evidence of overt discrimination by the Dycast managers who terminate him.

The direct method of establishing a *prima facie* case of discrimination requires evidence of discriminatory remarks that demonstrate a linkage between the adverse act and the decision-maker's alleged discriminatory animosity. (See, for example, Robin v. Espo Engineering Corp., 200 F.3d 1081, 1089 (7th Cir. 2000).). In the case before us, there was no evidence that Mr. Davidson ever made racial remarks towards the Hispanic workforce. It appears, by all accounts, that Mr. Davidson was equally abusive and loud towards all the workers at Dycast and that this was part of his management style. Respondent tired of his style and discharged him for that reason. Any formal complaints made by workers at Dycast against Mr. Davidson referred to his demeanor and did not allege any racial verbal abuse. In any event, Mr. Davidson was terminated prior to the actual elimination of Complainant's position, and therefore did not take part in the vote to eliminate the position. It is clear by the record that Mr. Davidson was not one of the decision-makers who voted to eliminate Complainant's position regardless of any input he may have had prior to his termination. Therefore, I find that Complainant has not presented any direct evidence of discrimination as it pertains to Mr. Davidson.

I now turn to the "Colombian Mafia" expression, which Complainant argues constitutes direct evidence of discrimination. The record shows that the term "Colombian Mafia" was used by the Hispanic workforce prior to Respondent's acquisition of Dycast. It is uncontested that the term was used in April of 1990 when Nixon Hare, the CEO for Respondent's investment group, asked Fabio Herrera, the Human Resource Director, if he had heard about the "Colombian Mafia." It is also uncontested that in April of 1991, Norman Kocol, the Vice President of Finance, directed the term towards Fabio Herrera prior to a management meeting. Respondents contend that the term was used by the workforce to mean someone who had control or power over jobs and promotions at Dycast. Complainant contends that the term was a racist remark that was directed at Complainant and the other two Colombian workers at Dycast.

I agree that the term in and of itself can be construed to be a direct racist bigoted remark that classifies individuals in terms of their race or national origin and ancestry, but there remains a question as to whether the term was actually used as a racist remark or a term of control. The Commission has defined direct evidence as being the sort of evidence, which, if believed by the trier-of-fact, will prove the particular fact in question without reliance upon inference or presumption. Belha and Modform, Inc., Ill. HRC Rep. (1987CF2953, January 31, 1995). Here, the record shows that the Hispanic workforce used the term whenever an employee was moved to a different position or promoted. The workers in effect would say that the "Colombian Mafia" struck again. The two times the terms was used by the present management was when Mr. Nixon inquired of its existence and when Mr. Kocol directed it towards Fabio Herrera prior to a management meeting. The inquiry cannot be construed to be the equivalent of a racist remark even though Mr. Herrera might have taken offense to it. The fact the term was being used and Mr. Nixon inquired about it, is not direct proof of discrimination. The latter incident

referred to Mr. Herrera and not the Complainant. As the record shows, Mr. Herrera was in control of jobs and promotions. It may well have been the case that Mr. Kocol, as well as the workforce was referring to Mr. Herrera in particular due to his actual control over the jobs and promotions in question. The record shows that the term was directed towards Mr. Herrera and not towards the Complainant or the other Colombian employee, Neff Herrera. As a matter of law, I cannot rely upon the inference or presumption that this remark was intended to be used towards the Complainant in a racist manner in order to find direct evidence of discrimination. Belha and Modform, Id.

Another issue regarding the remark came from a witness Complainant presented during the hearing. Luisa Sochaz testified that she worked for Fabio Herrera in 1991 and overheard some remarks regarding the term "Mafia." Ms. Sochaz' testimony was problematic because of its inconsistency. Ms. Sochaz testified that she heard Respondent refer to the "Metal Department Mafia" about four unknown times. She then switched her testimony to state that it was the term "Colombian Mafia" that was used. Ms. Sochaz then stated that she overheard Respondents say they were going to get rid of the "Metal Department Mafia" and then switched it to the "Colombian Mafia." Ms. Sochaz' testimony was in direct contradiction to her affidavit which she made in 1996 when she stated she only heard the remark once. The ALJ is in the best position to evaluate the credibility of witnesses, and if the issue before the trier of fact turns on conflicting testimony and the credibility of witnesses, its determination should be sustained. (Village of Bellwood, 184 Ill.App.3d 339, 541 N.E.2d 1248, 133 Ill. Dec. 810 (1st Dist. 1989)). In this instance, I find the testimony of the witness, Luisa Sochaz, not to be credible. As such, Complainant has not presented direct evidence of discrimination by way of Ms. Sochaz' testimony.

The only other issue brought forward by Complainant in his argument that he has presented direct evidence of discrimination concerns a statement purportedly made by Dycast President Robert Zach, in which he allegedly stated that "Hispanics have pride and are too macho" to take another job. Complainant contends that this statement was made to Neff Herrera when he asked Mr. Zach why Complainant was not given another job after his position was eliminated. Neff Herrera's testimony in this regard clearly shows that what Mr. Zach had stated was "they don't accept this type of work -- lower level work, being a *supervisor* to do something different." (emphasis added). This cannot be construed to mean anything other than the fact that Mr. Zach was referring to Complainant's status as a supervisor and not to his national origin or ancestry. For the reasons stated above, I do not find that Complainant has presented direct evidence of discrimination that is related to Respondent's decision to eliminate his position. Complainant must therefore attempt to prove a *prima facie* case through the indirect method found in the McDonnell-Douglas case, *Supra*.

Prima Facie Case of Discrimination:

The ultimate burden of proving a charge of unlawful discrimination remains at all time with the Complainant. Zaderaka, *Supra*. In this instance, Complainant has shown that he is a member of a protected class; Colombian/Hispanic. Complainant has also shown that he was performing his job consistent with respondent's legitimate expectations, and that he suffered an adverse employment action when his position was eliminated and was not called back. The remaining issue is whether similarly situated employees were treated more favorably under the given circumstances. Under a reduction in force case scenario, the relevant inquiry into situations where the job duties of a terminated employee have been given to another employee is to look at the employee who has assumed the terminated employee's job duties. Orlet and

Jefferson Smurfit Corporation d/b/a Alton Packaging Corporation, 40 Ill. HRC Rep. 363 (1988). Under the present situation, Complainant had his job duties assumed by Ron Pearson (Caucasian) and by Transito Contreras (Hispanic). The individuals who took over Complainant's duties were non-Colombians. In other words, they were not members of Complainant's protected class. Therefore, Complainant has established a *prima facie* case of discrimination based upon national origin and ancestry.

Respondent's Articulation:

Since a *prima facie* case has been established, a rebuttable presumption arises that the Respondent unlawfully discriminated against the Complainant. It now falls upon Respondent to rebut the presumption by articulating, not proving, a legitimate, nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, S.Ct. 1089 (1981). During the public hearing, Respondent articulated a legitimate, non-discriminatory reason for its actions. Under circumstances where the respondent has set forth its articulation, the question whether complainant has proved each element of the prima facie case is no longer as significant. Having articulated its reason for the adverse employment decision at issue, as will be detailed below, the only real question remaining in the instant case is whether Complainant has shown by a preponderance of the evidence that Respondent's articulation is a pretext for discrimination. Clyde and Caterpillar, Inc., 52 Ill. HRC Rep. 8 (1989), aff'd sub nom Clyde v. Human Rights Comm'n, 206 Ill. App. 3d 283, 564 N.E.2d 265, 151 Ill. Dec. 288 (4th Dist. 1990); Ruffin and South Shore YMCA, 33 Ill. HRC Rep. 64 (1987). The trier of fact may then turn to the ultimate question of whether unlawful discrimination has been proven. Torian and Dreisilker Electric Motors, Inc., 43 Ill. HRC Rep.164 (1988).

Therefore, the burden is upon Complainant to prove, by a preponderance of the evidence, that Respondent's articulated reason is false and is merely a pretext for unlawful discrimination. Clyde and Caterpillar, Inc., *Supra*; Ruffin and South Shore YMCA, 33 Ill. HRC Rep. 64 (1987). Pretext may be shown either directly, by offering evidence that a discriminatory reason more likely motivated the employer's actions, or indirectly, by showing that the employer's explanations were not worthy of belief. Burnham City Hospital v. Human Rights Commission, 126 Ill.App.3d 999, 467 N.E.2d 635 (1984). A complainant may discredit an employer's justification for its actions by demonstrating that: (1) the proffered reasons had no basis in fact; (2) the proffered reasons did not actually motivate the decision; or (3) the proffered reasons were insufficient to motivate the decision. Grohs v. Gold Bond Products, 859 F. 2d 1283 (7th Cir. 1988). Pretext may also be shown by preferential treatment to similarly situated employees outside a complainant's protected class. Loyola University v. Human Rights Commission, 149 Ill. App. 3d 8, 500 N.E. 2d 639 (1st Dist. 1986).

Respondent contends that there was a reduction in force due to financial difficulties and that Complainant's position was eliminated along with other positions because it was the least essential position from the manufacturing department and because it could be eliminated with the least amount of disruption to company operations. Respondent argues that Complainant's national origin and ancestry played no role in their decision to eliminate the Metals Supervisor position. Complainant contends that his position was eliminated due to his national origin and ancestry; Colombian/Hispanic, and that other similarly situated non-Colombian/Hispanic salaried employees did not have their positions eliminated. Complainant also argues that he was never given the opportunity to "bump" less senior employees. Complainant further argued that Respondent had a racial animosity towards its Hispanic workforce.

The facts emphatically show that Respondent was experiencing financial difficulties prior to its decision to implement a reduction in force. In fact, Respondent had taken a number of cost-cutting measures prior to the decision to eliminate jobs. On April 19, 1991, the five managers from the different departments met and voted to eliminate one salaried position from each department, along with the elimination of some hourly positions. Respondent's Human Resources Manager, Fabio Herrera, who is Colombian/Hispanic, was part of this group. The record shows that six salaried positions were eliminated from each of the various departments. In all, three were Caucasian, one was Argentinean/Hispanic and two were Colombian/Hispanic. Two of the positions held by Caucasians were eliminated altogether while the remaining positions were absorbed by other employees. The Cost Accountant and Human Resource Director positions were reinstated four years later. The supervisors in the Manufacturing Department were all Hispanics, with two of them being of Colombian nationality. It is in this light that we look at the issue of whether Respondent's articulated reason for the elimination of the Metals Supervisor position was a mere pretext for discrimination.

Complainant argues that the allegedly racial remarks made by Respondent and its animosity towards its Hispanic workforce show that the proffered reason given by Respondent is merely a pretext. For the reasons stated *supra* in regards to the issue of the alleged racial remarks, Complainant's argument must fail. Complainant also attempted to show Respondent's alleged racial animosity towards its Hispanic workforce with the argument that the company was attempting to "scapegoat" the workers because of setbacks experienced during the time the company was attempting to obtain a Q-1 rating from Ford Motor Company.[4] The fact that Respondent had concerns that it may not achieve the necessary rating due to the lack of English

literacy of its employees is not proof of racial animosity. The rating was related to a legitimate business concern and there was no evidence presented that Respondent either fired or took any action against any Hispanic employees who had problems with the English language.

Lastly, Complainant argues that regardless of Respondent's financial situation and subsequent elimination of his position, he should have been allowed to "bump" a less senior employee. In regards to the laid-off salaried employees, Complainant along with three other employees (Vogel, Schmidt and Ayala) would have had the right to bump less senior employees within their respective departments. As it stood, no salaried employees before or after the 1991 layoffs were given "bumping" rights. Complainant's "bumping" argument is further weakened by the language of the policy which states, "Seniority will govern provided the senior employee has the necessary experience, ability and physical condition, as determined by the company, to satisfactorily perform work within or at lower job classifications." The record shows that Complainant had no experience in running the various machines at Dycast and only drove a truck in limited situations. Therefore, Complainant lacked the experience and ability required in order to bump another employee.

In regards to the supervisors in the Metals Department, all of the supervisors were Hispanics and two were of Colombian descent. Suffice it to say, any of the supervisor's position that was to be eliminated was going to result in a Hispanic being laid-off. One Colombian was laid-off (Complainant), while one other Colombian was not. Under certain circumstances, the Commission has looked with a skeptical eye when the stated "reduction in force" concerns only one employee. (See, for example, Orlet and Jefferson Smurfit, 40 Ill. HRC Rep. 363, 375 (1985), where the Commission observed that claims of a reduction in force involving only one person are

[4] A Q-1 rating was required from all Ford suppliers in order to obtain any contracts for the manufacturing of Ford

more properly viewed as an "increased efficiency" situation, rather than an outgrowth of an employer's dire financial need.). This particular situation involved a company-wide layoff with Complainant's position being eliminated as part of a company-wide plan to save money. It is well established that the Commission cannot second guess a business decision made by an employer as long as the decision is not discriminatory. Garner and IDOT, Ill. HRC (1989SF0594, April 23, 1996). The facts palpably show that Complainant's position only required that he supervise three men, while the other supervisory positions required the supervision of 18 to 60 men. The fact that Complainant had other job duties that were not related to the functions of the Metals Department only lends credence to Respondent's argument that the Metals Department supervisor position was expendable. Under the circumstances, I find that Complainant has not met his burden of showing that the elimination of his position was a pretext by Respondent in order to disguise an intent to terminate Complainant on the basis of his national origin and ancestry.

RECOMMENDATION

Based upon the reasons stated above, I recommend that the instant Complaint and underlying Charges of Discrimination against Dycast, Incorporated be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
NELSON E. PEREZ
Administrative Law Judge
Administrative Law Section

ENTERED: January 23, 2003

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auto parts.